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No. 522

In the Supreme Court of the United States

OCTOBER TERM, 1968

F. L. CROWDER TR/AS HARRIMAN BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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Petitioner F. L. Crowder applied to the Federal Communications Commission for a permit to construct a new standard broadcast station at Harriman, Tennessee. Folkways Broadcasting Company, Inc., the licensee of AM station WHBT in Harriman, petitioned the Commission to deny Crowder's application and alternatively to designate it for hearing on a number of issues, including trafficking in broadcast authorizations. On January 14, 1966, the Commission without a hearing granted the Crowder application. Folkways appealed and the United States Court of

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Appeals for the District of Columbia Circuit, on January 5, 1967, remanded the case to the Commission for an evidentiary hearing on the allegations of trafficking. *Folkways Broadcasting Company, Inc.* v. *Federal Communications Commission,* 375 F. 2d 299. At the conclusion of the hearing, the Commission found, on the basis of the facts and circumstances elicited with respect to the trafficking issue, that a grant to Crowder would not serve the public interest. Accordingly, it denied Crowder's application. This ruling was affirmed by the court of appeals (Pet. App. 1a–9a) in a detailed opinion reciting at length all of the salient facts of record. The court concluded that "the Commission action under review was reached on application of proper principles and is amply supported by the record" (Pet. App. 9a).

1. The bulk of Crowder's petition seeks a reassessment of the facts upon the basis of which the court below reached its decision. Further review of the evidence is unwarranted, however, since substantiality of evidence on the record as a whole to support agency findings "is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In such instances, this Court has consistently adhered to a "rule of non-interference." See *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607; *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 400, citing *Federal Trade Commission* v. *American Tobacco Co.,* 274 U.S. 543, 544, and

National Labor Relations Board v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502–503.

2. Petitioner's only other contention is that the Commission's trafficking policy is "so vague and so vacillating as to put every broadcaster in fear of being alleged a trafficker when he desires to sell his facility," that this "could affect the course of radio and television communications in this country for years to come," which, in turn, commends this case to a determination by this Court (Pet. 44). To the contrary, we think it is clear that no substantial question warranting review is here presented. As the court below properly stated (Pet. App. 7a-8a):

> Trafficking is a familiar concept in broadcast regulation. The Commission's long standing policy reflects the Congressional concern behind the 1934 Act and its predecessor, the Radio Act of 1927, which sought, *inter alia,* to negative the assertion of any proprietary interest or right by a licensee in a frequency by limiting the duration of a license and providing for Commission approval of transfers. Efforts to prevent "speculat[ion], barter or trade in licenses" are as apparent from the early years of the 1934 Act as they are from the promulgation of the 1962 Rule. The standard has always been clear. The cases on which appellant relies reach different results based on their particular facts, but they do not deny the standard.

The Commission's decision was, therefore, properly sustained by the court below, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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General Counsel,
Federal Communications Commission.

OCTOBER 1968.

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